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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-322

MICHAEL SANTO POLIZZI, JACK S. SHAPIRO, PETER JAMES BELLANCA, ARTHUR J. ROOKS and ANTHONY JOSEPH ZERILLI,
Petitioners,

vs.

UNITED STATES OF AMERICA.

No. 74-323

ANTHONY GIORDANO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

This joint reply brief of petitioners Polizzi, Shapiro, Bellanca, Rooks and Zerilli in No. 74-322, and petitioner Giordano in No. 74-323, is being filed in typewritten form with printed copies to be forwarded as soon as available. It is the understanding of counsel that, pursuant to the provisions of Rule 24(3) of this Court, the petitions for writ of certiorari were distributed by the Clerk to the Court on December 23 1974, and that these matters are set for consideration on January 10, 1975. The govern-

ment's brief in opposition was due on December 12, 1974, but copies were not received by all counsel for petitioners until January 6, 1975. Because of such delay, it is impossible for counsel to file printed reply briefs prior to the date for consideration. The Court's permission to file the typewritten copies is respectfully requested.

REPLY BRIEF

Pursuant to Rule 24(4) and 24(5) of this Court, petitioners submit the following reply to the government's brief in opposition:

The brief in opposition is a shocking attempt to denigrate substantial questions presented in the petitions, by ignoring principal contentions,[1] mischaracterization of the record[2] and what the Court of Appeals held,[3] and reliance upon conclusions of the Court of Appeals without discussion of petitioners' legal attack upon its opinion. The lateness of the government's brief precludes a general reply to each of these matters; therefore, we restrict this reply to the concealed leniency agreement issue

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[1] See, e.g., prejudicial publicity and juror Palmer's post-trial disclosures, cf. *United States v. Thomas*, 463 F. 2d 1061 (7th Cir. 1972), (Polizzi Pet. II A, 19-21), and also constitutionality of conspiracy cases (Giordano Pet. V, 39-42).

[2] See, e.g., statement at p. 6 of Brief in opposition:

> "In later stages of the conspiracy, when further funding by Emprise would have risked exposure of the conspiracy, Giordano lent funds to Zerilli on two separate occasions."

The government cites no reference to the record, and there is absolutely no foundation in the record for such a statement.

[3] See, e.g., Question VI, presented in Polizzi Pet. 41-48, re prejudicial totality of errors, not discussed by Court of Appeals. The quotation on page 15 of Brief in opposition relates only to one of the 25 errors acknowledged by the Court.

(Question V, Polizzi Pet. 4, 38-41). (See Brief in opposition, 13-14).

Since these petitions were filed, the Eighth Circuit has flatly rejected the notion that sentence reduction relief can be granted long after the 120-day period provided in Rule 35 of the Federal Rules of Criminal Procedure. *United States v. Regan*, 503 F. 2d 234 (8th Cir. 1974), petition for writ of certiorari being filed this week. The decision of the Ninth Circuit is the only appellate decision of which we are aware which approves a government waiver of the jurisdictional limit in Rule 35. This judicial approval became necessary to support the conclusions that there were no "undisclosed promises by the prosecution" (Polizzi Pet. App. A-49, fn. 75 and 76, 500 F. 2d 856, 896 fn. 73 and 74, and accompanying text). The result of this device is to allow a district judge, *years* after finality of judgment, to usurp the parole and clemency powers of the Executive Branch, in direct conflict with the *Regan* case.

In *Regan*, the government was able to prevent the district judge from modifying a sentence after 120 days. In this case the government secretly stipulated with its star witness that the jurisdictional time limit of Rule 35 could be waived; long after finality of judgment in three cases (286 days, 463 days, and 775 days),[4] the government suffered without a whimper the grant of the same relief condemned in *Regan*. Only by an *ad hoc* reinterpretation of Rule 35 jurisdiction (see, e.g., *United States v. Gerard*, 491 F. 2d 1300 (9th Cir. 1972); *United States v. Ellenbogen*, 390 F. 2d 537 (2nd Cir. 1968), cert. den. 393 U.S. 918, rehearing denied 399 U.S. 917) could the Ninth Circuit conclude that the extraordinary sentencing relief—stipulated to both before and after Friedman testified in this case—was not a concealed government promise of leniency.

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[4] See chronological chart attached as Appendix A hereto.

There is only one material difference between *Regan* and this case. Judge Regan acted without the consent of the government; Judges Hill, Gray, and Whelan relied upon government concessions of *de facto* jurisdiction when they agreed to defer ruling on all three of Friedman's Rule 35 motions until after the trial of this case. It was the prosecutor's hiding of those unique concessions of jurisdiction which violated *Giglio v. United States*, 405 U.S. 150 (1972).[5]

Obviously, special leniency agreements were made by the government with Friedman. The full details of these agreements have never been revealed to this Court or any lower Court beyond what is apparent from the record—a waiver of Rule 35 jurisdictional restrictions. A full airing of the facts bearing upon the concealment of the leniency arrangements with Friedman and the details of the arrangements could be accomplished in the manner followed by this Court two months ago in *Ring v. United States*, — U.S. —, 95 S. Ct. 164 (1974).

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[5] Another illustration of erroneous factual representation in the government's brief in opposition appears at page 13, where the government states, on the issue of newly discovered evidence of leniency for Friedman, that "[t]he misconduct investigation against Friedman at the Lompoc Prison Camp was dropped because there was no evidence that Friedman had done anything wrong." The fact is that the Federal Strike Force in Los Angeles concluded a lengthy grand jury investigation of the Lompoc affair and recommended that Friedman be indicted along with the Alessios. Superior officials in the Department of Justice in Washington, disclosing no reasons, overruled that recommendation despite ample evidence of criminal activity by Friedman in the prison camp. (See *United States v. Alessio*, 9th Cir. No. 73-2904: Appellant's Opening Brief at 49-50; Appellee's Brief at 69; Appellant's Reply Brief at 25.)

CONCLUSION

For the reasons set forth in the petitions for writ of certiorari as well as the arguments set forth herein, it is respectfully submitted that these petitions for writ of certiorari should be granted.

Respectfully submitted

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